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2012 NOV 15 AM 10: 04 999 E Street, N.W.  
Washington, D.C. 20463

2012 NOV 14 PM 5: 58

**SENSITIVE**

**FIRST GENERAL COUNSEL'S REPORT**

**CELA**

RR 12L-27

DATE OF REFERRAL: June 19, 2012

DATE OF NOTIFICATIONS: June 22, 2012

LAST RESPONSE RECEIVED: July 20, 2012

DATE ACTIVATED: Aug. 16, 2012

EXPIRATION OF SOL:

(earliest) Jan. 12, 2014

(latest) Mar. 31, 2015

**RESPONDENTS:**

Michael Williams for Congress and Steven R. Hicks  
in his official capacity as treasurer

**RELEVANT STATUTES  
AND REGULATIONS:**

2 U.S.C. § 431(1)

2 U.S.C. § 441a(a)

2 U.S.C. § 441a(f)

11 C.F.R. § 100.2(c)

11 C.F.R. § 110.1(b)

11 C.F.R. § 110.1(j)

**INTERNAL REPORTS CHECKED:**

Disclosure Reports

**FEDERAL AGENCIES CHECKED:**

None

**I. INTRODUCTION**

The Reports Analysis Division ("RAD") referred this matter to the Office of the General Counsel ("OGC") for enforcement. The issue in this matter is whether Michael Williams for Congress and Steven R. Hicks in his official capacity as treasurer (collectively, the "Williams Committee" or the "Committee") violated the contribution limits of the Federal Election Campaign Act of 1971, as amended, (the "Act") by not refunding, redesignating, or reattributing \$458,824.35 in contributions that it received for a special election that never occurred. The Act establishes maximum individual contribution amounts per election. As a consequence,

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1 contributions raised for an anticipated special election that is not held must be refunded,  
2 redesignated, or reattributed to another election.

3 The Williams Committee raised \$490,824.35 for special Senate elections in Texas that it  
4 anticipated would occur if Senator Kay Bailey Hutchison resigned from office. But Senator  
5 Hutchison did not resign, and no special election occurred. In Advisory Opinion 2009-15 and in  
6 two legal determinations that specifically involved the Williams Committee's receipt and  
7 retention of these contributions, the Commission concluded that the Committee must refund,  
8 redesignate, or reattribute any contributions it received in anticipation of a special election that is  
9 not held.

10 Despite that guidance, the Williams Committee has failed to refund, redesignate, or  
11 reattribute \$458,824.35 of the \$490,824.35 in contributions it received for the special elections.  
12 Accordingly, we recommend the Commission find that there is reason to believe that the  
13 Williams Committee's violated 2 U.S.C. § 441a(f) and authorize pre-probable cause conciliation.

## 14 II. FACTS

15 In October 2007, Senator Hutchison indicated that she had formed a committee to run for  
16 Governor of Texas in the March 2010 primary and November 2010 general elections and that  
17 she might resign from the Senate during her gubernatorial campaign.<sup>1</sup> Had Senator Hutchison  
18 resigned from the Senate, a special election would have been conducted on November 3, 2009,  
19 May 8, 2010, November 2, 2010, or on another date determined by the Governor.<sup>2</sup>

20 On December 16, 2008, Williams filed his Statement of Candidacy (Form 2) and the  
21 Williams Committee filed its Statement of Organization (Form 1) with the Commission. The

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<sup>1</sup> Advisory Op. 2009-15 (White) at 1-2 ("AO 2009-15").

<sup>2</sup> Also, if Senator Hutchison won the gubernatorial election in 2010, she would have resigned from the Senate for the remainder of her term, and a special election would have been held. *Id.* at 2.

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Williams Committee received its first disclosed contribution on January 12, 2009.<sup>3</sup> The Williams Committee then raised the following total contribution amounts that it designated for the three potential special elections before it learned that there would be no special election:

Anticipated Election	Amount
Special Primary Election	\$458,824.35
Special Primary Runoff/ Special General Elections <sup>4</sup>	\$32,000.00
<b>TOTAL</b>	<b>\$490,824.35</b>

In June 2009, Bill White, the Mayor of Houston submitted an Advisory Opinion Request to the Commission. White asked whether he could accept and use contributions for a possible future special or emergency election to replace Senator Hutchison.<sup>5</sup> On July 29, 2009, the Commission concluded that, based on statements from Senator Hutchison and her agents, the likelihood of a special election was sufficiently real so that White could accept contributions for the anticipated special election.<sup>6</sup> But the Commission noted that if "the special election does not occur, contributions designated for the special election must be refunded to the contributor . . . unless the White Committee receives a written redesignation or combined redesignation and reattribution."<sup>7</sup>

<sup>3</sup> Michael Williams for U.S. Senate Comm., Amended April 2009 Quarterly Report at 32 (July 17, 2009).

<sup>4</sup> We have omitted a \$2,400 contribution that the Committee refunded five days after receipt.

<sup>5</sup> Advisory Op. Req. at 4, AO 2009-15.

<sup>6</sup> AO 2009-15 at 4-5.

<sup>7</sup> *Id.* at 7.

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1 On March 31, 2010, Senator Hutchison announced that she would not resign from the  
2 Senate, and thus there would be no special election.<sup>8</sup> The Williams Committee then refunded or  
3 redesignated \$32,000 in contributions it received for the anticipated special general and special  
4 runoff elections, but it retained \$458,824.35 in contributions it categorized as "special primary"  
5 election contributions.<sup>9</sup>

6 On June 17, 2011, RAD sent a Request for Additional Information to the Williams  
7 Committee stating that it must refund or redesignate the 2010 special primary election  
8 contributions.<sup>10</sup> On July 22, 2011, the Williams Committee responded that "based on [its]  
9 understanding of the appropriate regulatory provisions, the Committee has complied with the  
10 Commission's redesignation and refund requirements in conjunction with the Committee's 2010  
11 Senate activity."<sup>11</sup>

12 On December 13, 2011, OGC and the Office of Compliance ("OC") presented the  
13 following question to the Commission, pursuant to Directive 69: "whether a registered candidate  
14 for an anticipated special election that never occurs may retain contributions designated for that

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<sup>8</sup> See Press Release, Senator Kay Bailey Hutchison to Finish Term in Senate (Mar. 31, 2010) at [http://www.hutchison.senate.gov/?p=press\\_release&id=107](http://www.hutchison.senate.gov/?p=press_release&id=107).

<sup>9</sup> At the time of Senator Hutchison's announcement, the Committee had \$11,566 available in its 2010 "primary" account and also had outstanding obligations of \$4,004 for what it called its "primary campaign." See Letter from Thomas J. Josefiak and Michael Bayes, Counsel to the Committee, to Bradley Matheson, Senior Campaign Finance Analyst, FEC, at 2 (July 22, 2011). Additionally, the Committee had an outstanding \$100,000 loan from the candidate for the "primary campaign" to which it wished these remaining funds be applied. *Id.* at 2-3.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 1. The Committee also noted that Williams' Statement of Candidacy for the special election, unlike that of the requestor in AO 2009-15, had been limited to the anticipated 2010 special election. The Committee asserted that it solicited funds solely for the 2010 election and that the contributions in question were either specifically designated for the 2010 special primary or non-specifically designated for the "next upcoming election." *Id.* at 2.

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1 election.”<sup>12</sup> On February 6, 2012, the Commission voted 6-0 that the Williams Committee was  
2 required to refund, redesignate, or reattribute the contributions designated in writing for the  
3 anticipated 2010 Texas special election within 60 days of April 1, 2010 (when Senator Hutchison  
4 announced she would not be vacating her seat).<sup>13</sup>

5 Three days after the Commission's decision, RAD contacted the Williams Committee  
6 concerning the Commission's decision.<sup>14</sup> RAD informed Committee counsel that contributions  
7 specifically designated for the 2010 election that were spent before it became clear the election  
8 would not occur “should have been refunded or redesignated within 60 days of that date.”<sup>15</sup>

9 On February 15, 2012, the Williams Committee submitted a legal question to the  
10 Commission.<sup>16</sup> The Williams Committee identified the issue as “when a candidate raises funds  
11 for an anticipated special election that subsequently does not occur, must *all* funds raised in  
12 connection with that election be refunded or redesignated in writing, or is the candidate  
13 permitted to spend some or all of those funds in connection with the anticipated special  
14 election.”<sup>17</sup>

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<sup>12</sup> Memorandum from Patricia Carmona, *et al.*, to FEC Commissioners, LRA 872, at 1-2 (Dec. 13, 2011) (“Directive 69 Memo”).

<sup>13</sup> Certification, LRA 872 (Feb. 7, 2012). The Commission also determined that “the Committee was permitted to treat contributions that were not designated in writing for any particular election, or those non-specifically designated in writing for ‘the next upcoming election,’ as contributions made in connection with the 2012 Texas Senate primary election.” *Id.* (emphasis added).

<sup>14</sup> RAD Referral, Attach. 4, at 1.

<sup>15</sup> *Id.* at 2. RAD provided the Committee with the Directive 69 Memo as well as the Certification of the Commission's vote. See Memorandum from Christopher Hughey, Deputy General Counsel, FEC, to FEC Commissioners, LRA 872, at 3 (Mar. 19, 2012) (“Legal Consideration Memo”).

<sup>16</sup> See Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45,798 (Aug. 1, 2011) (establishing a method for the public to submit legal questions to the Commission in certain circumstances).

<sup>17</sup> Michael Williams for Congress, Request For Consideration of Legal Question by Commission Pursuant to Notice 2011-11, at 2 (Feb. 15, 2012) (emphasis in original).

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1           The Williams Committee gave five reasons why it should not be obligated to refund,  
2 redesignate, or reattribute “all” contributions for a special election that does not occur: (1) that it  
3 would be inequitable to require a candidate for an anticipated special election to choose between  
4 attributing activity to the next regularly scheduled election—as the Committee implies Mayor  
5 White disingenuously did—or declare candidacy for a special election at risk of refunding  
6 contributions should the anticipated special election not occur;<sup>18</sup> (2) that the Commission  
7 addressed an anticipated special election in a previous matter, Advisory Op. 2006-22 (Wallace)  
8 (“AO 2006-22”), but did not state that the contributions should be refunded if the election did not  
9 occur;<sup>19</sup> (3) that the Commission permits candidates in states where unopposed candidates do not  
10 appear on the ballot to raise and spend contributions;<sup>20</sup> (4) that AO 2009-15 recognized that the  
11 special election here likely would occur so that potential candidates could not await “certainty”  
12 before commencing their campaigns;<sup>21</sup> and (5) that treating contributions for an anticipated  
13 special election that does not occur the same as contributions for a future general election that  
14 must be refunded under 11 C.F.R. § 110.1(b)(3) leaves candidates “in legal limbo and unable to  
15 spend any funds at all” and, as such, Section 110.1(b)(3) is inapplicable.<sup>22</sup>

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<sup>18</sup> See *id.* at 4. The Committee noted that Mayor White’s committee was permitted to terminate in November 2010 without refunding the contributions he received and spent for the special election. White registered as a candidate for the 2012 election and contributions to him were designated for the 2012 senate primary election, an actual election that in fact occurred. Accordingly, his committee did not violate the Act’s contribution limits.

<sup>19</sup> See *id.* (citing AO 2006-22). In AO 2006-22, the Commission concluded that an individual who raised and spent money for an anticipated special election (a nominating process) was a candidate even though it was unknown at the time whether the election would occur. The Commission did not address the candidate’s obligations with regard to the contributions if the election did not occur.

<sup>20</sup> See *id.* (citing 11 C.F.R. 110.1(j)(2)-(4) and various advisory opinions).

<sup>21</sup> See *id.* at 4-5.

<sup>22</sup> See *id.* at 5-6.

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1 In response to the Committee's request, OGC recommended that the Commission  
2 reaffirm the conclusions that the Commission had reached on February 6, 2012, regarding the  
3 Directive 69 Memo.<sup>23</sup> OGC made this recommendation because: (1) the Commission had  
4 already concluded in AO 2009-15 that contributions raised for a special election that does not  
5 occur must be refunded, redesignated, or reattributed; (2) the authority that the Committee cited  
6 did not address the issue raised; and (3) the Committee's contentions conflicted with the  
7 Commission's conclusions in AO 2009-15.<sup>24</sup> The Commission "decided by a vote of 6-0 to  
8 reaffirm the conclusions the Commission made in this matter on February 6, 2012," that the  
9 Committee must refund, redesignate, or reattribute all contributions it received for an anticipated  
10 special election that did not occur.<sup>25</sup>

11 In Response to the Commission's notice of this RAD Referral, the Committee adopted its  
12 prior arguments and positions.<sup>26</sup> It also asserted that the material facts in this matter were  
13 distinguishable from those in AO 2009-15, that this matter presented a novel question of law,  
14 and that new rules may not be created through the enforcement process.<sup>27</sup> According to the  
15 Committee, the recommendations in the Directive 69 Memo and, by extension, the  
16 Commission's decisions, are "not warranted under existing law" and "impose[] a new rule of law  
17 on a committee without any prior notice."<sup>28</sup> The Committee requested that the matter be

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<sup>23</sup> Legal Consideration Memo at 7.

<sup>24</sup> *Id.* at 4-7.

<sup>25</sup> Certification, LRA 872 (Apr. 12, 2012).

<sup>26</sup> Letter from Thomas J. Josefiak and Michael Bayes, Counsel to the Committee, to Jeff Jordan, OGC, at 2 (July 20, 2012) ("Referral Response").

<sup>27</sup> *Id.* at 2-4.

<sup>28</sup> *Id.* at 6.

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1 dismissed immediately because "[n]o applicable authority or precedent exists on which a reason  
2 to believe finding could be based."<sup>29</sup>

### 3 III. LEGAL ANALYSIS

4 The Act provides that "no person shall make contributions . . . to any candidate and his  
5 authorized political committees with respect to *any election* for Federal office which, in the  
6 aggregate, exceed [\$2,400,]"<sup>30</sup> and that no candidate or political committee shall knowingly  
7 accept an excessive contribution.<sup>31</sup> The plain language of the Act also provides that the limits  
8 "shall apply separately with respect to *each election*["]<sup>32</sup>

9 Respondents assert that Williams was entitled to retain contributions for what the  
10 Respondents called the "2010 Special Primary." But it is indisputable that no such election was  
11 held, and the Commission unanimously decided in AO 2009-15 that the Act does not permit  
12 candidates to raise and keep funds for an anticipated election that does not occur: "If the White  
13 Committee raises money for a special election, and the special election does not occur,  
14 contributions designated for the special election must be refunded to the contributor . . . unless  
15 the White Committee receives a written redesignation or combined redesignation and  
16 reattribution."<sup>33</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> 2 U.S.C. § 441a(a)(1)(A) (emphasis added).

<sup>31</sup> 2 U.S.C. § 441a(f).

<sup>32</sup> 2 U.S.C. § 441a(a)(6) (emphasis added).

<sup>33</sup> AO 2009-15 at 7. The Committee's contention that, in AO 2009-15, the issue of "what to do with funds designated for an election that never occurs was not presented in a context that required serious consideration" is baseless. Resp. at 4. In Question 4, the requestor directly asked about -- and the Commission directly addressed -- the disposition of contributions raised for the special election in the event that no special election occurred. AO 2009-15 at 3, 7-8.

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1 After considering the Committee's arguments, the Commission has twice unanimously  
2 affirmed its guidance in AO 2009.<sup>34</sup> Despite these clear and unanimous Commission  
3 determinations that the Committee may not retain contributions it received for an election that  
4 did not occur and must either refund, redesignate, or reattribute those contributions, the  
5 Committee has retained approximately \$458,000 in contributions for an election that never  
6 occurred.

7 The Committee now argues that requiring it to refund or redesignate contributions for an  
8 election that never occurred is tantamount to creating a new rule through the enforcement  
9 process.<sup>35</sup> This argument also falls short.

10 The Committee's argument that the Commission's interpretation of the Act constitutes  
11 retroactive rulemaking is "nothing more than a claim that the Commission lacks power to  
12 enforce the standards of the Act in this proceeding."<sup>36</sup> But the Commission has a responsibility  
13 under 2 U.S.C. § 437c(b)(1) to seek to civilly enforce the Act's provisions,<sup>37</sup> including through  
14 adjudication in the enforcement process. "[W]here legal consequences hinge upon the  
15 interpretation of statutory requirements, and where no pre-existing interpretive rule construing  
16 those requirements is in effect, nothing prevents the agency from acting retroactively through  
17 adjudication."<sup>38</sup> The Supreme Court has therefore refused to impose a "rigid requirement" that

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<sup>34</sup> Certification, LRA 872 (Feb. 7, 2012); Certification, LRA 872 (Apr. 12, 2012).

<sup>35</sup> Referral Resp. at 3 (*citing* 11 C.F.R. § 112.4(e), which states that "[a]ny rule of law which is not stated in the Act . . . or in a regulation duly prescribed by the Commission, may be initially proposed only as a rule or regulation pursuant to procedures established in 2 USC 438(d)").

<sup>36</sup> *SEC v. Chenery Corp.*, 332 U.S. 194, 203-204 (1947).

<sup>37</sup> 2 U.S.C. § 437c(b)(1).

<sup>38</sup> *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 224 (1988) (Scalia, J., concurring) (*citing* *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293-294 (1974) *overruled on other grounds by* *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981), and *SEC v. Chenery Corp.*, 332 U.S., at 202-203).

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1 agencies are limited to formal rulemaking when fulfilling their important "function of filling in  
2 the interstices" of the statutes they administer; agencies may do so through case-by-case  
3 adjudication.<sup>39</sup>

4 In sum, in our view, the William's Committee's effort to reargue its case fails. Their  
5 reargument falters in the face of the plain language of the Act, a clear Advisory Opinion, and two  
6 legal determinations rendered by the Commission in this matter. The Committee's failure to  
7 refund, redesignate, or reattribute \$458,824.35 of the \$490,824.35 in contributions it received for  
8 the special elections that did not take place provides abundant reason to believe that that the  
9 Williams Committee's violated 2 U.S.C. § 441a(f).

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<sup>39</sup> *SEC v. Chenery Corp.*, 332 U.S. at 202-203 (agencies "must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. . . And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency"); *see also Shays v. FEC*, 511 F.Supp.2d 19, 25-6 (D. D.C. 2007) ("the decision of whether to proceed through case-by-case adjudication or by general rulemaking lies largely within the agency's discretion").

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**V. RECOMMENDATIONS**

1. Find reason to believe that Michael Williams for Congress and Steven R. Hicks in his official capacity as treasurer violated 2 U.S.C. § 441a(f).
2. Approve the attached Factual and Legal Analysis.

3. Enter into pre-probable cause conciliation with Michael Williams for Congress and Steven R. Hicks in his official capacity as treasurer.
4. Approve the appropriate letters.

Anthony Herman  
General Counsel

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November 14, 2012 BY: Daniel A. Petalas  
Date Daniel A. Petalas  
Associate General Counsel

Mark D. Shonkwiler  
Mark D. Shonkwiler  
Assistant General Counsel

Michael A. Columbo  
Michael A. Columbo  
Attorney

Attachments:

Advisory Opinion 2009-15 (White)  
Memorandum from Patricia Carmona, *et al.*, to FEC Commissioners, LRA 872  
(Dec. 13, 2011).

Memorandum from Christopher Hughey, Deputy General Counsel, FEC, to FEC  
Commissioners, LRA 872 (Mar. 19, 2012).



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

July 29, 2009

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

**ADVISORY OPINION 2009-15**

Barry Hunsaker, Treasurer  
Bill White for Texas  
P.O. Box 131197  
Houston, TX 77219 - 1197

Dear Mr. Hunsaker:

We are responding to your advisory opinion request, on behalf of Bill White for Texas (the "White Committee"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the raising and acceptance of contributions for a special election that may not occur. The Commission concludes that the White Committee may accept contributions for the Senatorial primary and general elections to be held in 2012 in Texas, and may currently accept contributions for a special or emergency election or runoff in 2009 or 2010 that has not been scheduled and may not occur.

***Background***

The facts presented in this advisory opinion are based on your letter received on June 12, 2009, and on reports filed with the Commission.

Bill White is currently the mayor of Houston, Texas. The White Committee is Mayor White's principal campaign committee for election to the United States Senate from Texas. The White Committee registered with the Commission on December 12, 2008. On December 15, 2008, Mayor White filed a Statement of Candidacy with respect to the 2012 Senate race. If a special or emergency election is called before 2012 to fill a vacancy in the Senate seat, Mayor White intends to be a candidate in that election.

Currently, Senator Kay Bailey Hutchison holds the Senate seat that will be contested in the 2012 primary and general elections. However, Senator Hutchison has

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stated publicly that she will not be a candidate for re-election in 2012,<sup>1</sup> and she has formed a committee under Texas law to raise funds to run for Governor of Texas in the 2010 March primary and November general elections. Senator Hutchison has discussed the possibility of resigning from the Senate during the course of her gubernatorial campaign.<sup>2</sup>

Under the Texas Election Code (the "Election Code"), if Senator Hutchison resigns from the Senate before her term expires, a "special election" to fill that seat may be scheduled for November 3, 2009, May 8, 2010, or November 2, 2010, depending on the timing of the resignation. Election Code §§210.023 and 3.003. It is also possible that the Governor may schedule an "emergency election" on another date to fill the vacancy if the Governor determines that an emergency exists. Election Code §41.0011. The Governor has considerable discretion in deciding whether to call such an election, and it is not currently possible to predict whether he would do so.<sup>3</sup>

A special election to fill a U.S. Senate seat would not be conducted as a party primary, but as an election in which candidates from all parties appear on the same ballot, with party affiliation indicated. Election Code §203.003. If no candidate receives a majority, that election is followed by a runoff election between the two candidates receiving the most votes in the first election.

Regularly scheduled party primary and general elections for the Senate seat will be held in 2012. If no candidate receives a majority in the party primary, a runoff will be held. It is thus conceivable that Mayor White could be a candidate in up to five elections for the same U.S. Senate seat between now and November 2012: a special election in 2009 or 2010, a runoff for that election, the 2012 Democratic party primary, a primary runoff, and a general election in November 2012.

#### ***Questions Presented<sup>4</sup>***

1. *If a contributor makes an undesignated contribution to the White Committee of \$2,400 or less, and a special Senate election is subsequently scheduled after that contribution is made but before the March 2012 Senate primary election, would that undesignated contribution be available to the White Committee to use for the special Senate election?*
2. *May the White Committee accept a contribution of up to \$4,800 from an individual before a special Senate election is scheduled if the contributor (i) designates up to \$2,400 for a special Senate election if one is held, or for the 2012 primary election*

<sup>1</sup> Gamboa, Suzanne, "Texas senator won't run for re-election," *USA Today*, October 16, 2007.

<sup>2</sup> *Id.*

<sup>3</sup> The term "special election" is used throughout the remainder of this advisory opinion to refer to either a special or emergency election.

<sup>4</sup> These questions use the \$2,400 per person per election contribution limit in place for the 2009-2010 election cycle. That amount may be adjusted for inflation in the 2011-2012 election cycle. See generally, 2 U.S.C. 441a(b).

*if there is no special Senate election; and (ii) designates up to \$2,400 for either a runoff election following the special Senate election if a runoff is held, or to the 2012 general election if there is no such runoff?*

**3. With respect to a contribution that exceeds \$2,400 and that is made before any special election is scheduled:**

*(a) Is the contribution properly designated if the contributor uses a form stating that "Federal Election Law allows individuals to donate up to \$4,800; \$2,400 for the first election and \$2,400 for any subsequent election" and there is no other designation language provided?*

*(b) Is the contribution designated to the 2012 primary and/or 2012 general election pursuant to a form described in question 3(a) properly redesignated to the special and/or runoff election if the White Committee provides the contributor a form letter, such as the one attached as Appendix D in the Request, stating that the White Committee is designating \$2,400 for "the first election" and the remaining amount for "the second election in which Mayor White participates"?*

*(c) If the notice of redesignation described in question 3(b) relating to a special election and possible runoff election is not effective as to a special election and possible runoff election, will the notice of redesignation nevertheless be effective as to the primary and general elections of 2012?*

*(d) If the notice of redesignation is effective as to the 2012 primary and general elections, may the White Committee use the contribution for a special election and, if one is required, a runoff election if special election is called before the 2012 primary election occurs?*

**4. If the White Committee raises money for a special election, and for a runoff following a special election, and the special election or runoff does not occur, what may the Committee do with the money?**

**5. How should the White Committee report designated contributions if the answer to Question 2 is yes, and redesignated contributions if the answer to Question 3 is yes?**

#### **Legal Analysis and Conclusions**

**1. If a contributor makes an undesignated contribution to the White Committee of \$2,400 or less, and a special Senate election is subsequently scheduled after that contribution is made but before the March 2012 Senate primary election, would that undesignated contribution be available to the White Committee to use for the special Senate election?**

Yes, an undesignated contribution of up to \$2,400 would be available to the White Committee to use for the Senate special election that is called after the contribution is made.

Contributions by a person other than a multicandidate committee to a Federal candidate's authorized committees are limited to \$2,400 "with respect to any election." 11 CFR 110.1(b); 2 U.S.C. 441a(a)(1)(A) and 441a(c). Commission regulations state that "with respect to any election" means: (1) in the case of a contribution designated in writing by the contributor for a particular election, the election so designated; and (2) in the case of a contribution not designated in writing by the contributor, the next election for the Federal office after the contribution is made. 11 CFR 110.1(b)(2). Under the circumstances described, a special election that has been called would be the next Federal election after the undesignated contribution is made. Therefore, the undesignated contribution may be used for that election (but is subject to the reporting requirements set forth in the answer to question 5).

2. *May the White Committee accept a contribution of up to \$4,800 from an individual before a special Senate election is scheduled if the contributor (i) designates up to \$2,400 for a special Senate election if one is held, or for the 2012 primary election if there is no special Senate election; and (ii) designates up to \$2,400 for either a runoff election following the special Senate election if a runoff is held, or to the 2012 general election if there is no such runoff?*

Yes, contributions may be designated in this alternative, under the circumstances as set forth in question 2. The White Committee may accept up to \$2,400 from an individual contributor for the 2012 primary or, in the alternative, a special election that has not yet been scheduled. The White Committee may also accept up to \$2,400 from that same individual contributor for the general election in 2012 or, in the alternative, for a runoff for a not-yet-declared special election.

Commission regulations provide for the designation of a contribution for "a particular election." See 11 CFR 110.1(b)(2), (3), and (4). Such a designated contribution must not cause the contributor to exceed the contribution limits at 2 U.S.C. 441a(a)(1) with respect to the particular election, and contributions designated for an election that has already occurred may only be accepted to the extent such contributions do not exceed the committee's net debts outstanding. See 11 CFR 110.1(b)(1) and (3)(i). Thus, for an authorized committee to accept a designated contribution of \$4,800, which is \$2,400 in excess of the per election limit, the contributor must clearly state in writing that \$2,400 is designated for one particular election and \$2,400 is designated for another particular election, either on the check (or other negotiable instrument) or in a writing accompanying the contribution.

The Commission concludes that designations for the special election and for the runoff would qualify as references to "a particular election." Although the designations present these particular elections in the alternative (*i.e.*, (1) the special election if held before 2012 and, if not so held, the 2012 primary; or (2) the special election runoff if

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held before 2012 and, if not so held, the 2012 general election), the specific use of the contribution will be clear to both the Committee and the contributor based on circumstances that will be a matter of public record: that the Governor would have to call a special election following the resignation of Senator Hutchinson.

Moreover, the likelihood of the occurrence of a special election is sufficiently real in this situation. Based on statements from Senator Hutchinson and her agents, Mayor White is presented with a strong possibility that Senator Hutchinson will resign before the gubernatorial primary or gubernatorial general election as well as a certainty that she will resign by the end of 2010 if she is elected Governor.<sup>5</sup>

Thus, the White Committee may use the described designations to accept up to \$2,400 for the special election and up to \$2,400 for the runoff to that election. The White Committee must use an acceptable accounting method to distinguish between the contributions received for each of the two elections, e.g., by designating separate bank accounts for each election or maintaining separate books and records for each election. 11 CFR 102.9(e)(1).<sup>6</sup>

The designations described in question 2 would be treated as designations for the special election or the runoff to that election at the point that Senator Hutchinson announces her resignation and Mayor White becomes a candidate in a special election called by the Governor. At that point, the contributions can no longer be considered to be designated for the 2012 regularly scheduled elections. After the end of any pre-2012 elections (special or runoff) in which Mayor White actually participates as a candidate, the White Committee may use unused surplus funds (as determined by use of a reasonable accounting method under 11 CFR 110.3(c)(4)) for the 2012 primary election.

3. *With respect to a contribution that exceeds \$2,400 and that is made before any special election is scheduled:*

*(a) Is the contribution properly designated if the contributor uses a form stating that "Federal Election Law allows individuals to donate up to \$4,800; \$2,400 for the first election and \$2,400 for any subsequent election" and there is no other designation language provided?*

Yes, any such contribution is properly designated. If at the time the contribution is made Senator Hutchinson has not resigned, no special or runoff election has been called, and the possibility of a special or runoff election is not even mentioned in the forms, current contributors who use the form described in question 3(a) must conclude that the "first election" referenced in the forms means the 2012 primary, and the "second

<sup>5</sup> See Advisory Opinion 2006-22 (Wallace) (where the Commission concluded that an individual raising and spending funds for his candidacy was considered a Federal candidate even at a time when the question of whether the relevant special nominating process would be held was subject to court rulings that had not yet been made).

<sup>6</sup> The Committee must not spend funds designated for the runoff election unless Mayor White participates in the runoff as a candidate. See 11 CFR 102.9(e)(3).

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election" means the 2012 general election. Accordingly, barring any further instruction from a contributor, the first \$2,400 contributed would be designated for the 2012 primary election. Any remaining amount up to \$2,400 would likewise be considered designated for the 2012 general election. See 11 CFR 110.1(b)(2) and (4).

*(b) Is the contribution designated to the 2012 primary and/or 2012 general election pursuant to a form described in question 3(a) properly redesignated to the special and/or runoff election if the White Committee provides the contributor a form letter, such as the one attached as Appendix D in the Request, stating that the White Committee is designating \$2,400 for "the first election" and the remaining amount for "the second election in which [Mayor White] participates"?*

No, any contributions designated for the 2012 primary and/or general election are not properly redesignated to the special and/or runoff election by the form letter described in question 3(b). Once a contribution is designated to a particular election, it cannot be presumptively redesignated to another election, which is what the form letter attached as Appendix D in the Request purports to do. See 11 CFR 110.1(b)(5)(ii)(B)(2) and (C)(2). Thus, in order to use funds received in response to the wording of the form described in question 3(a) for a 2009 or 2010 special election or runoff, the White Committee must first obtain written redesignations from the contributors for the special election or runoff in accordance with 11 CFR 110.1(b)(5)(ii)(A)(1) and (2).<sup>7</sup>

*(c) If the notice of redesignation described in question 3(b) relating to a special election and possible runoff election is not effective, will the notice of redesignation nevertheless be effective as to the primary and general elections of 2012?*

Given that the Commission has already concluded in answering question 3(a) above that the language in the forms would result in the proper designation of the contributions for the 2012 primary and general elections, this question is moot. The White Committee would not need to redesignate contributions that already are properly designated. If the Request is asking whether the White Committee may use the notice of redesignation described in question 3(b), such as the one attached as Appendix D in the Request, to redesignate contributions that already are designated, the answer remains the same as the answer to question 3(b). Contributions that already are designated must be redesignated by obtaining a writing from the contributor; simply issuing a notice to the contributor, such as the one attached as Appendix D, will not suffice. See 11 CFR 110.1(b)(5)(ii)(A)(1) and (2).

<sup>7</sup> Although Commission regulations only specifically address redesignation of excessive contributions, nothing in the Commission's regulations is intended to suggest that political committees may not seek redesignation of contributions that are *within* the contribution limitations and restrictions. See 11 CFR 110.1(b)(5)(i)(A)-(D).

If, on the other hand, the Request is asking whether undesignated contributions that exceed the per-election contribution limit may be presumptively redesignated between the 2012 primary and general elections, then the answer is contingent on whether a special and/or runoff election are called, since the redesignation language contained in the notice attached as Appendix D of the Request is contingent on that fact. In the event the special and runoff elections are not called, the form letter would constitute an effective presumptive redesignation pursuant to 11 CFR 110.1(b)(5)(ii)(B) and (C), since the letter states that the White Committee is designating a certain amount to the primary election (in the event a special election is not called) and a certain amount to the general election (in the event a runoff election does not occur).

*(d) If the notice of redesignation is effective as to the 2012 primary and general elections, may the White Committee use the contribution for a special election and, if one is required, a runoff election if special election is called before the 2012 primary election occurs?*

If the White Committee wishes to use contributions that have been designated for the 2012 primary and general elections for a 2009 or 2010 special election or runoff once the special election is called, the White Committee must first obtain written contributor redesignations for the special election or runoff in accordance with 11 CFR 110.1(b)(5)(ii)(A)(1) and (2).

4. *If the White Committee raises money for a special election, and for a runoff following a special election, and the special election or runoff does not occur, what may the Committee do with the money?*

If the White Committee raises money for a special election, and the special election does not occur, contributions designated for the special election must be refunded to the contributor within sixty days of the last date that a special election may be scheduled under Texas law, unless the White Committee receives a written redesignation or combined redesignation and reattribution. 11 CFR 110.1(b)(3)(i)(C); see Advisory Opinion 1992-15 (Russo) (concluding that the 60-day period begins to run on the date that the committee "has actual notice of the need to obtain redesignations . . . or refund the contribution[s]").

Similarly, although the Committee may accept contributions designated for the runoff once it is apparent that a special election will occur, it may not use those contributions unless Mayor White participates in the runoff as a candidate. See Advisory Opinion 1982-49 (Weicker) (recognizing that accepting contributions for an election at a time before the necessity of such an election is determined is analogous to accepting general election contributions before the primary election). Contributions designated for an election that does not occur, or in which a person is not a candidate (for example, where a candidate has lost the primary and is hence not running in the general election), must be refunded, redesignated for another election in which the candidate has participated or in participating in accordance with 11 CFR 110.1(b)(5), or redesignated and reattributed to another contributor in accordance with 11 CFR 110.1(k)(3). See

11 CFR 102.9(e)(3), 110.1(b)(3)(i), and 103.3(b)(3), and Advisory Opinions 1992-25 (Owens), 1986-17 (Green), and 1982-49 (Weicker). Thus, if Mayor White loses the special election, or if any candidate receives a majority in the special election (and therefore there is no special runoff election), contributions designated for the special election runoff must be refunded to the contributor within sixty days of the special election unless the White Committee receives a written redesignation or combined redesignation and reattribution. 11 CFR 110.1(b)(3)(i)(C).

5. *How should the White Committee report designated contributions if the answer to Question 2 is yes, and redesignated contributions if the answer to Question 3 is yes?*

In reporting contributions accompanied by the written statements described in question 2 that are received before a special election is scheduled, the White Committee must check a box on Schedule A indicating either a "Primary" contribution or a "General" contribution for the 2012 elections and include a memo text stating either (1) "Designated for special or emergency election if scheduled before 2012" or (2) "Designated for special or emergency election runoff if scheduled before 2012." Such reporting reflects the use of the contributions as they are intended by the contributor at the time the contribution is made. If Senator Hutchison announces her resignation, and Mayor White becomes a candidate in a special election called by the Governor, the White Committee must inform the Commission that the contributions are considered to be designated for the special election or the runoff election. Normally, when the designation of a contribution has been changed, the political committee must disclose the redesignation on the report covering the period in which it received the redesignation, including a memo entry for each contribution that indicates when the Committee received a new designation from the contributor. See 11 CFR 104.8(d); see also *Instructions for FEC Form 3 and Related Schedules*, p. 9. Under the circumstances presented, where the White Committee is attempting to deal with uncertainty as to the proper way to designate contributions in an unusual electoral situation, the Commission considers it to be sufficient for the White Committee to file amended reports, simply indicating the proper designations of the contributions. The Commission recommends that to avoid any confusion, the White Committee include memo text specifically referencing this advisory opinion.

Further, the Commission must also be informed of any changes to the potential use of undesignated contributions received pursuant to question 1. The White Committee should similarly file amended reports for these contributions once a special election is called.

Contributions received using the forms described in question 3 must be reported as contributions designated for the 2012 primary election or 2012 general election.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a

conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law. All cited advisory opinions are available on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)  
Steven T. Walther  
Chairman

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

2011 DEC 13 A 9 53

December 13, 2011

**SENSITIVE**

**MEMORANDUM**

**TO:** The Commission

**THROUGH:** Alec Palmer *AP*  
Staff Director

**FROM:** Compliance Office *PC*  
Patricia Carmona  
Chief Compliance Officer

Deborah Chacona *DC*  
Assistant Staff Director  
Reports Analysis Division

Nataliya Ioffe *NUI*  
Authorized Branch Chief  
Reports Analysis Division

Office of General Counsel  
Christopher Hughey *pch*  
Deputy General Counsel

Lawrence L. Calvert, Jr. *LC*  
Associate General Counsel  
General Law and Advice

Lorenzo Holloway *LH*  
Assistant General Counsel  
Public Finance and Audit Advice

Allison T. Steinle *AS*  
Attorney

**SUBJECT:** Request for Commission Guidance on the Michael Williams for U.S. Senate Committee (LRA 872)

**I. INTRODUCTION**

Pursuant to Directive 69, the Office of Compliance ("OC") and the Office of General Counsel ("OGC") seek the Commission's guidance on an issue arising from a query from the Reports Analysis Division ("RAD") on the Michael Williams for U.S. Senate Committee ("the Committee"). The question presented is whether a registered candidate for an anticipated special election that never occurs may retain contributions designated for that election. OC and OGC believe that the issue presented below is a novel question of law that should be brought to the Commission for its determination.

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## II. ISSUE STATEMENT

In Advisory Opinion 2009-15 (White), the Commission concluded that if a candidate raised money for the anticipated 2010 Texas Senate special election for Senator Kay Bailey Hutchison's seat, and the special election did not occur, that candidate's committee was required to refund any contributions designated for the special election to the contributor within sixty days of the last date that a special election could be scheduled under Texas law, unless the committee received a written redesignation or combined redesignation or reattribution. In that case, however, the candidate was a registered candidate for the 2012 Texas Senate election and was never registered with the Commission as a candidate for the anticipated 2010 special election. The candidate asked a series of questions about whether he could raise money for the anticipated special election, or could raise money in the alternative either for the anticipated special election or the 2012 Texas Senate election if the anticipated special election did not occur. Here, Mr. Williams claims that he was solely a registered candidate for the anticipated 2010 special election, and did not solicit or raise funds for the 2012 Texas Senate election. Mr. Williams did not register with the Commission as a candidate for that election until it became clear that the special election would not occur. Mr. Williams appears to argue that as a result he was under no obligation to refund, or to obtain redesignations or reattributions for, contributions that he raised in connection with the anticipated special election. OGC and OC seek the Commission's guidance on whether a registered candidate for an anticipated special election that never occurs may retain contributions designated for that election.

## III. SHORT ANSWER

We conclude that the Committee was required to refund, or obtain redesignations or reattributions for, the contributions designated in writing for the anticipated 2010 Texas Senate special election within sixty days of April 1, 2010. However, we conclude that the Committee was permitted to treat contributions that were not designated in writing for any particular election, or those non-specifically designated in writing for "the next upcoming election," as contributions made in connection with the 2012 Texas Senate primary election. If the Committee chose to treat undesignated contributions as having been received in connection with the 2012 Texas Senate primary election, it was required to amend its reports to indicate this.

## IV. FACTUAL BACKGROUND

Michael Williams filed a Statement of Candidacy with the Commission on December 16, 2008 indicating that he was a candidate for election in the anticipated 2010 Texas Senate special election, which would have occurred had Senator Kay Bailey Hutchison resigned her Senate seat to run for governor of Texas.<sup>1</sup> Mr. Williams actively campaigned for the special election

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<sup>1</sup> Senator Hutchison had discussed the possibility of resigning her Senate seat during the course of her gubernatorial campaign. Although Mr. Williams filed a Statement of Candidacy for a 2010 Texas Senate special election, had Senator Hutchison resigned her seat before her term expired, a special election could have been scheduled for November 3, 2009, May 8, 2010, or November 2, 2010, depending on the timing of the resignation. See Texas Election Code §§ 201.023, 3.003.

beginning in December 2008. The Committee accepted approximately \$450,000 in contributions that it reported as received in connection with the anticipated 2010 special primary election and made expenditures in connection with the anticipated special primary election.<sup>2</sup>

On April 1, 2010, Senator Hutchison announced that that she would not resign her Senate seat, meaning that there would be no 2010 Texas Senate special election. At that time, the Committee had spent all but \$11,566 of the contributions it had received, and had outstanding debts of \$4,004 and an outstanding \$100,000 loan from the candidate, causing the Committee to have a negative net outstanding balance. On April 8, 2010, Mr. Williams filed a revised Statement of Candidacy for the regularly scheduled 2012 Texas Senate election.<sup>3</sup> The Committee has not refunded any of the contributions that it reported as received in connection with the anticipated 2010 Texas Senate special primary election, nor has it reported any of the contributions as redesignated for the 2012 Texas Senate election.

On June 17, 2011, RAD sent the Committee a Request for Additional Information ("RAFI") noting that the Committee reported the receipt of contributions designated for the 2010 Texas Senate special election, which did not occur. Attachment 2. The RAFI stated that the Committee was required to refund or redesignate contributions designated for the special election within sixty days of the April 1, 2010 announcement that the special election would not occur, citing to 11 C.F.R. § 110.1(b)(3) and Advisory Opinion 2009-15 (White). *Id.* In response to the RAFI, the Committee claims that it "has complied with the Commission's redesignation and refund requirements in conjunction with the Committee's 2010 Senate activity," because "unlike other candidates seeking [Senator Hutchinson's] seat, including the requestor in Advisory Opinion 2009-15, Mr. Williams filed only as a candidate for the expected 2010 Senate race." *Id.* The Committee claims that it "appropriately secured redesignations or refunded contributions remaining in the 2010 account as of the April 1, 2010 announcement." *Id.* However, it appears that the Committee only secured refunds or redesignations for contributions designated for a "special runoff" or "special general" election, and as of April 1, 2010 had already spent or obligated contributions that it reported as received in connection with the anticipated special primary election.

The Committee also claims that some of the contributions received prior to April 1, 2010 were "non-specifically designated for the 'next upcoming election.'" *Id.* at 2. It is unclear whether the Committee means that these contributions were in fact contributions that were not

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<sup>2</sup> The Committee also accepted approximately \$32,000 in contributions that it reported as designated for a "special runoff" or "special general" election. Under Texas law, a special election would not have been conducted as a party primary and all candidates would have appeared on the same ballot, but if no candidate received the majority of the vote, the special election would have been followed by a runoff election between the two candidates with the most votes. Texas Election Code § 203.003. The Committee either refunded these contributions or reported the contributions as redesignated for the regularly scheduled 2012 Texas Senate election.

<sup>3</sup> On June 15, 2011, Mr. Williams filed another revised Statement of Candidacy indicating that he was now a candidate for election in the 2012 election to the U.S. House of Representatives from the 33<sup>rd</sup> Congressional District of Texas. The Committee likewise amended its Statement of Organization to change its name to Michael Williams for Congress. RAD's initial inquiry to OGC did not ask about, and this memorandum does not address, any issues arising from the application of the previous-to-current or current-to-current transfer rules of 11 C.F.R. § 110.3(c)(4) and (5) to these events.



designated in writing by the contributor for a particular election, *see* 11 C.F.R. §§ 110.1(b)(2)(ii), 110.2(b)(2)(ii), or whether it means that these contributions were designated in writing by the contributor for "the next upcoming election." However, the Committee reported all contributions received prior to April 1, 2010 as received in connection with the anticipated 2010 Texas Senate special election, and never amended its reports to change these contributions' designations after Senator Hutchinson's April 1, 2010 announcement. Accordingly, RAD has no way of determining how many contributions received during this time period were designated in writing for the 2010 Texas Senate special election, and how many were not designated in writing for any election or were designated in writing for "the next upcoming election."

## V. ANALYSIS

In Advisory Opinion 2009-15 (White), the Commission addressed several questions by Mayor Bill White, who had filed a Statement of Candidacy for the regularly scheduled 2012 Texas Senate election, concerning the same anticipated 2010 Texas Senate special election at issue here. The Commission concluded that an undesignated contribution of \$2,400 or less would be available for the White Committee to use if a 2009 or 2010 Texas Senate special election was subsequently scheduled because contributions are limited to \$2,400 "with respect to any election," and a "special election that has been called would be the next Federal election after the undesignated contribution is made." *See* 2 U.S.C. §§ 441a(a)(1)(A), 441a(c); 11 C.F.R. § 110.1(b)(2). The Commission also concluded that a contributor could designate a \$4,800 contribution in the alternative such that \$2,400 would be for a special election if one was held, or for the regularly scheduled 2012 Texas Senate primary election if a special election was not held, and \$2,400 would be for a runoff special election if one was held, or for the regularly scheduled 2012 Texas Senate general election if a special election was not held. The Commission noted that by designating contributions in the alternative, "the specific use of the contribution will be clear to both the Committee and the contributor based on circumstances that will be a matter of public record: that the Governor would have to call a special election following the resignation of Senator Hutchison." The Commission concluded that the White Committee could not presumptively redesignate contributions designated in writing for the 2012 Texas Senate primary or general elections for a special election if one was called.

Most importantly as it pertains to this matter, however, the Commission concluded that if the White Committee raised money for the special election, and the special election did not occur, the White Committee was required to refund any contributions designated for the special election to the contributor within sixty days of the last date that a special election could be scheduled under Texas law, unless the committee received a written redesignation or combined redesignation or reattribution. *See* 11 C.F.R. § 110.1(b)(3)(i)(C); Advisory Opinion 1992-15 (Russo) (concluding that the sixty-day period begins to run on the date that the committee "has actual notice of the need to obtain redesignations . . . or refund contributions"). The Commission noted that "contributions designated for an election that does not occur . . . must be refunded, redesignated for another election in which the candidate has participated or is participating in accordance with 11 C.F.R. § 110.1(b)(5), or redesignated and reattributed to another contributor in accordance with 11 C.F.R. § 110.1(k)(3)." Finally, the Commission noted that the White

Committee would be required to file amended reports if the designation of a contribution would change depending on whether a special election was scheduled.

The Commission's conclusion appears to be applicable here as well. Nothing in Advisory Opinion 2009-15 suggests that its conclusion that contributions designated for the special election had to be refunded or redesignated if the special election did not occur turns on the fact that Mayor White was registered with the Commission as a candidate in the regularly scheduled 2012 Texas Senate election. By permitting the White Committee to "raise money for a special election" but requiring it to refund or redesignate contributions designated for that election if the special election did not occur, it appears that the Commission concluded that committees that chose to raise and spend money for special elections that have not yet been scheduled do so at their own risk. Accordingly, we recommend that the Commission conclude that the Committee was required to refund, or obtain redesignations or reattributions of, the contributions designated in writing for the special election within sixty days of Senator Hutchinson's April 1, 2010 announcement that she would not resign her seat, meaning that the special election would not occur.

We also recommend, however, that the Commission conclude that the Committee could treat contributions that were not designated in writing for any particular election, or those non-specifically designated in writing for "the next upcoming election," as contributions made in connection with the 2012 regular Texas Senate primary election. Contributions not designated in writing by a contributor for a particular election are treated as made for the next election for that Federal office after the contribution is made. See 11 C.F.R. §§ 116.1(b)(2)(ii), 116.2(b)(2)(ii). The necessary corollary to the conclusion in Advisory Opinion 2009-15 (White) that a "special election that has been called would be the next Federal election after the undesignated contribution is made" is that if no special election is ever called, the next regularly scheduled election for that office would be the "next Federal election." Given that Mr. Williams amended his Statement of Candidacy to declare himself a candidate in the regularly scheduled 2012 Texas Senate election within a week of Senator Hutchinson's April 1, 2010 announcement, it seems both consistent with the plain language of the Commission's regulations, and equitable in terms of how Mayor White was permitted to treat undesignated contributions, to permit the Committee to treat undesignated contributions as having been made for the regularly scheduled 2012 Texas Senate election. Under this theory, because the Committee never amended its reports to change these contributions' designations after the April 1, 2010 announcement, it would need to file amended reports designating those contributions that were non-specifically designated for the 2012 Texas Senate election under the guidance on reporting provided in Advisory Opinion 2009-15 (White).

## VI. RECOMMENDATION

We recommend that the Commission conclude that the Committee was required to refund, redesignate, or reattribute the contributions designated in writing for the anticipated 2010 Texas Senate special election within sixty days of April 1, 2010; that the Committee was permitted to treat contributions that were not designated in writing for any particular election, or those non-specifically designated in writing for "the next upcoming election," as contributions made in connection with the 2012 Texas Senate primary election; and that the Committee, if it

chose to treat undesignated contributions as having been received in connection with the 2012 Texas Senate primary election, was required to amend its reports to indicate this.

**Attachments:**

1. Query from the Reports Analysis Division dated October 25, 2011
2. RFAI from the Reports Analysis Division dated June 17, 2011

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**RAD Authorized Branch Request for Informal Guidance to OGC GLA:  
Michael Williams for Congress (f/k/a Michael Williams for US Senate), C00457960**

**Question:**

RAD would like to request informal guidance from OGC GLA on the issue of whether a candidate for an anticipated Texas Senate 2010 Special Election that did not occur is entitled to retain contributions designated for the 2010 Special Primary Election. (The candidate's committee spent the 2010 Special Primary Election contribution funds for campaigning before the announcement was made that the Special Election would not occur. None of the Special Primary Election contributions were refunded to contributors.)

**Background:**

The candidate, Michael L. Williams, filed a Statement of Candidacy (Form 2) on December 16, 2008 for the anticipated 2010 Special Election for the seat of Texas Senator Kay Bailey Hutchison, who was expected to resign to run for governor in 2010. Michael Williams actively campaigned for the Senate seat beginning in December 2008, and his committee, Michael Williams for US Senate Committee (C00457960),<sup>1</sup> collected contributions and made expenditures for the expected 2010 Senate race. On April 1, 2010, Senator Hutchison announced that she would not resign until her term expired in 2012, ending the chance for a Special Election in 2010. As of April 1, 2010, the committee spent all but \$11,566 of the 2010 Special Primary Election contributions it received. The committee had outstanding 2010 Special Primary debts of \$4,004 and a \$100,000 2010 Special Primary loan owed to the candidate, so the net balance of the remaining 2010 Special Primary funds was zero. The committee never refunded any of the 2010 Special Primary contributions. (The exact total amount of contributions received by the committee that were designated for the 2010 Special Primary Election cannot be determined. The committee's reports disclosed the receipt of approximately \$450,000 in contributions designated for the 2010 Special Primary Election received before April 1, 2010. However, the committee's Miscellaneous Document Submission (Form 99), received July 22, 2011, stated that some of the contributions collected by the committee were "non-specifically designated for the 'next upcoming election.'" The committee appears to have reported such contributions as designated for the 2010 Special Primary Election although they were not specifically designated by contributors. The committee never amended their reports to change contribution designations after the April 1, 2011 announcement that Senator Hutchison would not resign.) As of April 1, 2010, the committee also had \$32,000 in 2010 Special Runoff and Special General contributions. On April 8, 2010, Michael Williams filed a Statement of Candidacy for the 2012 Texas Senate seat. All of the 2010 Special Runoff and Special General contributions were timely redesignated to the 2012 Senate race or refunded.

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<sup>1</sup> The committee name changed to Michael Williams for Congress on 6/15/11 after the candidate dropped out of the 2012 Senate race and filed a Statement of Candidacy to pursue a 2012 House seat.

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Subsequently, on June 15, 2011, Michael Williams filed a Statement of Candidacy for the 2012 Texas District 33 House seat, and renamed the committee "Michael Williams for Congress." Currently, the committee is collecting 2012 contributions from the donors who have already contributed the maximum limit to the 2010 Special Primary, an election that did not occur.

AO 2009-15 (Bill White for Texas) addressed the situation of an anticipated Special election for Kay Bailey Hutchison's Senate seat in 2009 or 2010 as follows:

*"4. If the White Committee raises money for a special election, and for a runoff following a special election, and the special election or runoff does not occur, what may the Committee do with the money?"*

If the White Committee raises money for a special election, and the special election does not occur, contributions designated for the special election must be refunded to the contributor within sixty days of the last date that a special election may be scheduled under Texas law, unless the White Committee receives a written redesignation or combined redesignation and reattribution. 11 CFR 110.1(b)(3)(i)(C); see Advisory Opinion 1992-15 (Russo) (concluding that the 60-day period begins to run on the date that the committee "has actual notice of the need to obtain redesignations . . . or refund the contribution[s]")."

On June 17, 2011, RAD sent an RFAI to the committee questioning the failure to refund or redesignate 2010 Special Primary contributions within 60 days of the determination that the election would not occur, citing AOs 2009-15 and 1992-15 and 11 CFR § 110.1(b)(3). On July 22, 2011, the committee filed a Form 99 explaining that they complied with their understanding of the regulations and AOs (see attached). Among other points, the committee stated that unlike Bill White, the requestor in AO 2009-15 who filed a Statement of Candidacy for 2012, Michael Williams filed a Statement of Candidacy for 2010 and solicited and raised all funds specifically for the anticipated 2010 Senate election. The committee spent nearly all of the funds in connection with that race before the April 1, 2010 announcement indicating that the election would not occur, and used the remaining funds to remedy obligations from that anticipated election. Furthermore, the committee refunded or redesignated all 2010 Special Runoff and Special General contributions within the permissible timeframe.

RAD requests OGC GLA's guidance concerning whether the committee is allowed not to refund the 2010 Special Primary contributions.

**Attachments:**

- (1) AO 2009-15 (Bill White for Texas)
- (2) Miscellaneous Document Submission (Form 99), filed 7/22/11

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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

July 29, 2009

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

ADVISORY OPINION 2009-15

Barry Hunsaker, Treasurer  
Bill White for Texas  
P.O. Box 131197  
Houston, TX 77219 - 1197

Dear Mr. Hunsaker:

We are responding to your advisory opinion request, on behalf of Bill White for Texas (the "White Committee"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the raising and acceptance of contributions for a special election that may not occur. The Commission concludes that the White Committee may accept contributions for the Senatorial primary and general elections to be held in 2012 in Texas, and may currently accept contributions for a special or emergency election or runoff in 2009 or 2010 that has not been scheduled and may not occur.

***Background***

The facts presented in this advisory opinion are based on your letter received on June 12, 2009, and on reports filed with the Commission.

Bill White is currently the mayor of Houston, Texas. The White Committee is Mayor White's principal campaign committee for election to the United States Senate from Texas. The White Committee registered with the Commission on December 12, 2008. On December 15, 2008, Mayor White filed a Statement of Candidacy with respect to the 2012 Senate race. If a special or emergency election is called before 2012 to fill a vacancy in the Senate seat, Mayor White intends to be a candidate in that election.

Currently, Senator Kay Bailey Hutchison holds the Senate seat that will be contested in the 2012 primary and general elections. However, Senator Hutchison has

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stated publicly that she will not be a candidate for re-election in 2012,<sup>1</sup> and she has formed a committee under Texas law to raise funds to run for Governor of Texas in the 2010 March primary and November general elections. Senator Hutchison has discussed the possibility of resigning from the Senate during the course of her gubernatorial campaign.<sup>2</sup>

Under the Texas Election Code (the "Election Code"), if Senator Hutchison resigns from the Senate before her term expires, a "special election" to fill that seat may be scheduled for November 3, 2009, May 8, 2010, or November 2, 2010, depending on the timing of the resignation. Election Code §§210.023 and 3.003. It is also possible that the Governor may schedule an "emergency election" on another date to fill the vacancy if the Governor determines that an emergency exists. Election Code §41.0011. The Governor has considerable discretion in deciding whether to call such an election, and it is not currently possible to predict whether he would do so.<sup>3</sup>

A special election to fill a U.S. Senate seat would not be conducted as a party primary, but as an election in which candidates from all parties appear on the same ballot, with party affiliation indicated. Election Code §203.003. If no candidate receives a majority, that election is followed by a runoff election between the two candidates receiving the most votes in the first election.

Regularly scheduled party primary and general elections for the Senate seat will be held in 2012. If no candidate receives a majority in the party primary, a runoff will be held. It is thus conceivable that Mayor White could be a candidate in up to five elections for the same U.S. Senate seat between now and November 2012: a special election in 2009 or 2010, a runoff for that election, the 2012 Democratic party primary, a primary runoff, and a general election in November 2012.

#### ***Questions Presented<sup>4</sup>***

1. *If a contributor makes an undesignated contribution to the White Committee of \$2,400 or less, and a special Senate election is subsequently scheduled after that contribution is made but before the March 2012 Senate primary election, would that undesignated contribution be available to the White Committee to use for the special Senate election?*
2. *May the White Committee accept a contribution of up to \$4,800 from an individual before a special Senate election is scheduled if the contributor (i) designates up to \$2,400 for a special Senate election if one is held, or for the 2012 primary election*

<sup>1</sup> Gamboa, Suzanne, "Texas senator won't run for re-election," *USA Today*, October 16, 2007.

<sup>2</sup> *Id.*

<sup>3</sup> The term "special election" is used throughout the remainder of this advisory opinion to refer to either a special or emergency election.

<sup>4</sup> These questions use the \$2,400 per person per election contribution limit in place for the 2009-2010 election cycle. That amount may be adjusted for inflation in the 2011-2012 election cycle. *See generally*, 2 U.S.C. 441a(b).

*if there is no special Senate election; and (ii) designates up to \$2,400 for either a runoff election following the special Senate election if a runoff is held, or to the 2012 general election if there is no such runoff?*

3. *With respect to a contribution that exceeds \$2,400 and that is made before any special election is scheduled:*

*(a) Is the contribution properly designated if the contributor uses a form stating that "Federal Election Law allows individuals to donate up to \$4,800; \$2,400 for the first election and \$2,400 for any subsequent election" and there is no other designation language provided?*

*(b) Is the contribution designated to the 2012 primary and/or 2012 general election pursuant to a form described in question 3(a) properly redesignated to the special and/or runoff election if the White Committee provides the contributor a form letter, such as the one attached as Appendix D in the Request, stating that the White Committee is designating \$2,400 for "the first election" and the remaining amount for "the second election in which Mayor White participates"?*

*(c) If the notice of redesignation described in question 3(b) relating to a special election and possible runoff election is not effective as to a special election and possible runoff election, will the notice of redesignation nevertheless be effective as to the primary and general elections of 2012?*

*(d) If the notice of redesignation is effective as to the 2012 primary and general elections, may the White Committee use the contribution for a special election and, if one is required, a runoff election if special election is called before the 2012 primary election occurs?*

4. *If the White Committee raises money for a special election, and for a runoff following a special election, and the special election or runoff does not occur, what may the Committee do with the money?*

5. *How should the White Committee report designated contributions if the answer to Question 2 is yes, and redesignated contributions if the answer to Question 3 is yes?*

#### ***Legal Analysis and Conclusions***

1. *If a contributor makes an undesignated contribution to the White Committee of \$2,400 or less, and a special Senate election is subsequently scheduled after that contribution is made but before the March 2012 Senate primary election, would that undesignated contribution be available to the White Committee to use for the special Senate election?*



Yes, an undesignated contribution of up to \$2,400 would be available to the White Committee to use for the Senate special election that is called after the contribution is made.

Contributions by a person other than a multicandidate committee to a Federal candidate's authorized committees are limited to \$2,400 "with respect to any election." 11 CFR 110.1(b); 2 U.S.C. 441a(a)(1)(A) and 441a(c). Commission regulations state that "with respect to any election" means: (1) in the case of a contribution designated in writing by the contributor for a particular election, the election so designated; and (2) in the case of a contribution not designated in writing by the contributor, the next election for the Federal office after the contribution is made. 11 CFR 110.1(b)(2). Under the circumstances described, a special election that has been called would be the next Federal election after the undesignated contribution is made. Therefore, the undesignated contribution may be used for that election (but is subject to the reporting requirements set forth in the answer to question 5).

2. *May the White Committee accept a contribution of up to \$4,800 from an individual before a special Senate election is scheduled if the contributor (i) designates up to \$2,400 for a special Senate election if one is held, or for the 2012 primary election if there is no special Senate election; and (ii) designates up to \$2,400 for either a runoff election following the special Senate election if a runoff is held, or to the 2012 general election if there is no such runoff?*

Yes, contributions may be designated in the alternative, under the circumstances as set forth in question 2. The White Committee may accept up to \$2,400 from an individual contributor for the 2012 primary or, in the alternative, a special election that has not yet been scheduled. The White Committee may also accept up to \$2,400 from that same individual contributor for the general election in 2012 or, in the alternative, for a runoff for a not-yet-declared special election.

Commission regulations provide for the designation of a contribution for "a particular election." See 11 CFR 110.1(b)(2), (3), and (4). Such a designated contribution must not cause the contributor to exceed the contribution limits at 2 U.S.C. 441a(a)(1) with respect to the particular election, and contributions designated for an election that has already occurred may only be accepted to the extent such contributions do not exceed the committee's net debts outstanding. See 11 CFR 110.1(b)(1) and (3)(i). Thus, for an authorized committee to accept a designated contribution of \$4,800, which is \$2,400 in excess of the per election limit, the contributor must clearly state in writing that \$2,400 is designated for one particular election and \$2,400 is designated for another particular election, either on the check (or other negotiable instrument) or in a writing accompanying the contribution.

The Commission concludes that designations for the special election and for the runoff would qualify as references to "a particular election." Although the designations present these particular elections in the alternative (*i.e.*, (1) the special election if held before 2012 and, if not so held, the 2012 primary; or (2) the special election runoff if

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held before 2012 and, if not so held, the 2012 general election), the specific use of the contribution will be clear to both the Committee and the contributor based on circumstances that will be a matter of public record: that the Governor would have to call a special election following the resignation of Senator Hutchinson.

Moreover, the likelihood of the occurrence of a special election is sufficiently real in this situation. Based on statements from Senator Hutchinson and her agents, Mayor White is presented with a strong possibility that Senator Hutchinson will resign before the gubernatorial primary or gubernatorial general election as well as a certainty that she will resign by the end of 2010 if she is elected Governor.<sup>5</sup>

Thus, the White Committee may use the described designations to accept up to \$2,400 for the special election and up to \$2,400 for the runoff to that election. The White Committee must use an acceptable accounting method to distinguish between the contributions received for each of the two elections, e.g., by designating separate bank accounts for each election or maintaining separate books and records for each election. 11 CFR 102.9(e)(1).<sup>6</sup>

The designations described in question 2 would be treated as designations for the special election or the runoff to that election at the point that Senator Hutchinson announces her resignation and Mayor White becomes a candidate in a special election called by the Governor. At that point, the contributions can no longer be considered to be designated for the 2012 regularly scheduled elections. After the end of any pre-2012 elections (special or runoff) in which Mayor White actually participates as a candidate, the White Committee may use unred surplus funds (as determined by use of a reasonable accounting method under 11 CFR 110.3(c)(4)) for the 2012 primary election.

3. *With respect to a contribution that exceeds \$2,400 and that is made before any special election is scheduled:*

*(a) Is the contribution properly designated if the contributor uses a form stating that "Federal Election Law allows individuals to donate up to \$4,800; \$2,400 for the first election and \$2,400 for any subsequent election" and there is no other designation language provided?*

Yes, any such contribution is properly designated. If at the time the contribution is made Senator Hutchinson has not resigned, no special or runoff election has been called, and the possibility of a special or runoff election is not even mentioned in the forms, current contributors who use the form described in question 3(a) must conclude that the "first election" referenced in the forms means the 2012 primary, and the "second

<sup>5</sup> See Advisory Opinion 2006-22 (Wallace) (where the Commission concluded that an individual raising and spending funds for his candidacy was considered a Federal candidate even at a time when the question of whether the relevant special nominating process would be held was subject to court rulings that had not yet been made).

<sup>6</sup> The Committee must not spend funds designated for the runoff election unless Mayor White participates in the runoff as a candidate. See 11 CFR 102.9(e)(3).

election" means the 2012 general election. Accordingly, barring any further instruction from a contributor, the first \$2,400 contributed would be designated for the 2012 primary election. Any remaining amount up to \$2,400 would likewise be considered designated for the 2012 general election. See 11 CFR 110.1(b)(2) and (4).

*(b) Is the contribution designated to the 2012 primary and/or 2012 general election pursuant to a form described in question 3(a) properly redesignated to the special and/or runoff election if the White Committee provides the contributor a form letter, such as the one attached as Appendix D in the Request, stating that the White Committee is designating \$2,400 for "the first election" and the remaining amount for "the second election in which [Mayor White] participates"?*

No, any contributions designated for the 2012 primary and/or general election are not properly redesignated to the special and/or runoff election by the form letter described in question 3(b). Once a contribution is designated to a particular election, it cannot be presumptively redesignated to another election, which is what the form letter attached as Appendix D in the Request purports to do. See 11 CFR 110.1(b)(5)(ii)(B)(2) and (C)(2). Thus, in order to use funds received in response to the wording of the form described in question 3(a) for a 2009 or 2010 special election or runoff, the White Committee must first obtain written redesignations from the contributors for the special election or runoff in accordance with 11 CFR 110.1(b)(5)(ii)(A)(1) and (2).<sup>7</sup>

*(c) If the notice of redesignation described in question 3(b) relating to a special election and possible runoff election is not effective, will the notice of redesignation nevertheless be effective as to the primary and general elections of 2012?*

Given that the Commission has already concluded in answering question 3(a) above that the language in the forms would result in the proper designation of the contributions for the 2012 primary and general elections, this question is moot. The White Committee would not need to redesignate contributions that already are properly designated. If the Request is asking whether the White Committee may use the notice of redesignation described in question 3(b), such as the one attached as Appendix D in the Request, to redesignate contributions that already are designated, the answer remains the same as the answer to question 3(b). Contributions that already are designated must be redesignated by obtaining a writing from the contributor; simply issuing a notice to the contributor, such as the one attached as Appendix D, will not suffice. See 11 CFR 110.1(b)(5)(ii)(A)(1) and (2).

<sup>7</sup> Although Commission regulations only specifically address redesignation of excessive contributions, nothing in the Commission's regulations is intended to suggest that political committees may not seek redesignation of contributions that are *within* the contribution limitations and restrictions. See 11 CFR 110.1(b)(5)(i)(A)-(D).

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If, on the other hand, the Request is asking whether undesignated contributions that exceed the per-election contribution limit may be presumptively redesignated between the 2012 primary and general elections, then the answer is contingent on whether a special and/or runoff election are called, since the redesignation language contained in the notice attached as Appendix D of the Request is contingent on that fact. In the event the special and runoff elections are not called, the form letter would constitute an effective presumptive redesignation pursuant to 11 CFR 110.1(b)(5)(ii)(B) and (C), since the letter states that the White Committee is designating a certain amount to the primary election (in the event a special election is not called) and a certain amount to the general election (in the event a runoff election does not occur).

*(d) If the notice of redesignation is effective as to the 2012 primary and general elections, may the White Committee use the contribution for a special election and, if one is required, a runoff election if special election is called before the 2012 primary election occurs?*

If the White Committee wishes to use contributions that have been designated for the 2012 primary and general elections for a 2009 or 2010 special election or runoff once the special election is called, the White Committee must first obtain written contributor redesignations for the special election or runoff in accordance with 11 CFR 110.1(b)(5)(ii)(A)(1) and (2).

*4. If the White Committee raises money for a special election, not for a runoff following a special election, and the special election or runoff does not occur, what may the Committee do with the money?*

If the White Committee raises money for a special election, and the special election does not occur, contributions designated for the special election must be refunded to the contributor within sixty days of the last date that a special election may be scheduled under Texas law, unless the White Committee receives a written redesignation or combined redesignation and reattribution. 11 CFR 110.1(b)(3)(i)(C); see Advisory Opinion 1992-15 (Russo) (concluding that the 60-day period begins to run on the date that the committee "has actual notice of the need to obtain redesignations . . . or refund the contribution[s]").

Similarly, although the Committee may accept contributions designated for the runoff once it is apparent that a special election will occur, it may not use those contributions unless Mayor White participates in the runoff as a candidate. See Advisory Opinion 1982-49 (Weicker) (recognizing that accepting contributions for an election at a time before the necessity of such an election is determined is analogous to accepting general election contributions before the primary election). Contributions designated for an election that does not occur, or in which a person is not a candidate (for example, where a candidate has lost the primary and is hence not running in the general election), must be refunded, redesignated for another election in which the candidate has participated or is participating in accordance with 11 CFR 110.1(b)(5), or redesignated and reattributed to another contributor in accordance with 11 CFR 110.1(k)(3). See

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11 CFR 102.9(e)(3), 110.1(b)(3)(i), and 103.3(b)(3), and Advisory Opinions 1992-25 (Owens), 1986-17 (Green), and 1982-49 (Weicker). Thus, if Mayor White loses (a special election, or if any candidate receives a majority in the special election (and therefore there is no special runoff election), contributions designated for the special election runoff must be refunded to the contributor within sixty days of the special election unless the White Committee receives a written redesignation or combined redesignation and reattribution. 11 CFR 110.1(b)(3)(i)(C).

5. *How should the White Committee report designated contributions if the answer to Question 2 is yes, and redesignated contributions if the answer to Question 3 is yes?*

In reporting contributions accompanied by the written statements described in question 2 that are received before a special election is scheduled, the White Committee must check a box on Schedule A indicating either a "Primary" contribution or a "General" contribution for the 2012 elections and include a memo text stating either (1) "Designated for special or emergency election if scheduled before 2012" or (2) "Designated for special or emergency election runoff if scheduled before 2012." Such reporting reflects the use of the contributions as they are intended by the contributor at the time the contribution is made. If Senator Hutchison announces her resignation, and Mayor White becomes a candidate in a special election called by the Governor, the White Committee must inform the Commission that the contributions are considered to be designated for the special election or the runoff election. Normally, when the designation of a contribution has been changed, the political committee must disclose the redesignation on the report covering the period in which it received the redesignation, including a memo entry for each contribution that indicates when the Committee received a new designation from the contributor. See 11 CFR 104.8(d); see also *Instructions for FEC Form 3 and Related Schedules*, p. 9. Under the circumstances presented, where the White Committee is attempting to deal with uncertainty as to the proper way to designate contributions in an unusual electoral situation, the Commission considers it to be sufficient for the White Committee to file amended reports, simply indicating the proper designations of the contributions. The Commission recommends that to avoid any confusion, the White Committee include memo text specifically referencing this advisory opinion.

Further, the Commission must also be informed of any changes to the potential use of undesignated contributions received pursuant to question 1. The White Committee should similarly file amended reports for these contributions once a special election is called.

Contributions received using the forms described in question 3 must be reported as contributions designated for the 2012 primary election or 2012 general election.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a

conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law. All cited advisory opinions are available on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)  
Steven T. Walther  
Chairman



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20461

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March 19, 2012

**MEMORANDUM**

**SENSITIVE**

**TO:** The Commission

**THROUGH:** Alec Palmer  
Staff Director

**FROM:** Christopher Hughey  
Deputy General Counsel

Lawrence L. Calvert, Jr.  
Associate General Counsel  
General Law and Advice

Lorenzo Holloway  
Assistant General Counsel  
Public Finance and Audit Advice

Allison T. Steinle  
Attorney

**SUBJECT:** Request for Commission Consideration of a Legal Question by the Michael Williams for U.S. Senate Committee (LRA 872)

**I. INTRODUCTION**

The purpose of this memorandum is to address a Request for Commission Consideration of a Legal Question by the Michael Williams for U.S. Senate Committee ("the Committee"), and make recommendations about how the Commission should direct the Reports Analysis Division ("RAD") to proceed with respect to this question.

Specifically, the Committee asks: "[W]hen a candidate raises funds for an anticipated special election that subsequently does not occur, must *all* funds raised in connection with that election be refunded or redesignated in writing, or is the candidate permitted to spend some or all of those funds in connection with the anticipated special election?" See Letter from Thomas J. Josefiak and Michael Bayes, Counsel to the Committee, to Commission Secretary, at 2 (Feb. 15, 2012) [hereinafter Committee Request]. We recommend that the Commission conclude that a candidate is required to refund or obtain written redesignations for contributions designated in

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writing for a special election that subsequently does not occur. The practical effect of this conclusion is that a candidate may not spend these funds, or at least must otherwise retain enough funds to cover any potential refunds that would be required if the special election does not occur. We also recommend, however, that the Commission conclude that a candidate is permitted to treat contributions that were not designated in writing for any particular election, or those non-specifically designated in writing for "the next upcoming election," as contributions made in connection with the next regularly scheduled election in which the candidate is participating; and that if the candidate chooses to treat undesignated contributions as having been received in connection with the next regularly scheduled election, the candidate is required to amend the committee's reports to indicate this. A candidate may spend these funds in any manner consistent with 2 U.S.C. § 439a(a).

## II. BACKGROUND

Michael Williams filed a Statement of Candidacy with the Commission on December 16, 2008 indicating that he was a candidate for election in the anticipated 2010 Texas Senate special election, which would have occurred had Senator Kay Bailey Hutchison resigned her Senate seat to run for governor of Texas.<sup>1</sup> Mr. Williams actively campaigned for the special election beginning in December 2008. The Committee accepted approximately \$450,000 in contributions that it reported as received in connection with the anticipated 2010 special primary election and made expenditures in connection with the anticipated special primary election.<sup>2</sup>

On April 1, 2010, Senator Hutchison announced that she would not resign her Senate seat, meaning that there would be no 2010 Texas Senate special election. At that time, the Committee had spent all but \$11,566 of the contributions it had received, and it had outstanding debts of \$4,004 and an outstanding \$100,000 loan from the candidate, causing the Committee to have a negative net outstanding balance. On April 8, 2010, Mr. Williams filed a revised Statement of Candidacy for the regularly scheduled 2012 Texas Senate election.<sup>3</sup> The

<sup>1</sup> Senator Hutchison had discussed the possibility of resigning her Senate seat during the course of her gubernatorial campaign. Although Mr. Williams filed a Statement of Candidacy for a 2010 Texas Senate special election, had Senator Hutchison resigned her seat before her term expired, a special election could have been scheduled for November 3, 2009, May 8, 2010, or November 2, 2010, depending on the timing of the resignation. See Texas Election Code §§ 201.023, 3.003.

<sup>2</sup> The Committee also accepted approximately \$32,000 in contributions that it reported as designated for a "special runoff" or "special general" election. Under Texas law, a special election would not have been conducted as a party primary and all candidates would have appeared on the same ballot, but if no candidate received the majority of the vote, the special election would have been followed by a runoff election between the two candidates with the most votes. Texas Election Code § 203.003. The Committee either refunded these contributions or reported the contributions as redesignated for the regularly scheduled 2012 Texas Senate election.

<sup>3</sup> On June 15, 2011, Mr. Williams filed another revised Statement of Candidacy indicating that he was now a candidate for election in the 2012 election to the U.S. House of Representatives from the 33<sup>rd</sup> Congressional District of Texas. The Committee likewise amended its Statement of Organization to change its name to Michael Williams for Congress. The Committee did not ask about, and this memorandum does not address, any issues arising from the application of the previous-to-current or current-to-current transfer rules of 11 C.F.R. § 110.3(c)(4) and (5) to these events.



Committee has not refunded any of the contributions that it reported as received in connection with the anticipated 2010 Texas Senate special primary election, nor has it reported any of the contributions as redesignated for the 2012 Texas Senate election. It appears that the Committee only secured refunds or redesignations for contributions designated for a "special runoff" or "special general" election, and as of April 1, 2010 had already spent or obligated contributions that it reported as received in connection with the anticipated special primary election.

The Committee has stated that some of the contributions received prior to April 1, 2010 were "non-specifically designated for the 'next upcoming election.'" Letter from Thomas J. Josefiak and Michael Bayes, Counsel to the Committee, to Bradley Mattheson, Senior Campaign Finance Analyst, at 2 (July 22, 2011). We are unsure whether the Committee means that these contributions were in fact contributions that were not designated in writing by the contributor for a particular election, see 11 C.F.R. §§ 110.1(b)(2)(ii), 110.2(b)(2)(ii), or whether it means that those contributions were designated in writing by the contributor for "the next upcoming election." The Committee, however, reported all contributions received prior to April 1, 2010 as received in connection with the anticipated 2010 Texas Senate special election, and never amended its reports to change these contributions' designations after Senator Hutchison's April 1, 2010 announcement. Accordingly, RAD has no way of determining how many contributions received during this time period were designated in writing for the 2010 Texas Senate special election, and how many were not designated in writing for any election or were designated in writing for "the next upcoming election."

The Office of General Counsel ("OGC") and the Office of Compliance ("OC") recently sought the Commission's guidance on this issue pursuant to Directive 69. See Memorandum to the Commission, Request for Commission Guidance on the Michael Williams for U.S. Senate Committee (LRA 872) (Dec. 13, 2011). On February 6, 2012, the Commission adopted OGC and OC's recommendation and voted to conclude that "the Committee was required to refund, redesignate, or reattribute the contributions designated in writing for the anticipated 2010 Texas Senate special election within sixty days of April 1, 2010; that the Committee was permitted to treat contributions that were not designated in writing for any particular election, or those non-specifically designated in writing for 'the next upcoming election,' as contributions made in connection with the 2012 Texas Senate primary election; and that the Committee, if it chose to treat undesignated contributions as having been received in connection with the 2012 Texas Senate primary election, was required to amend its reports to indicate this."

On February 9, 2012, RAD informed the Committee that OGC and OC had submitted a request for guidance pursuant to Directive 69, and that the Commission had voted to approve OGC and OC's recommendation on the issue. On February 15, 2012, the Committee submitted its Request for Commission Consideration of a Legal Question pursuant to the Commission's Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45,798 (Aug. 1, 2011). RAD subsequently provided the Committee with a copy of the Directive 69 memorandum and the Commission's vote certification. The Committee, however, stated that it wished to proceed with its request. On February 23, 2012, the Commission granted the Committee's request for consideration.

### III. ANALYSIS

The Committee asks: "[W]hen a candidate raises funds for an anticipated special election that subsequently does not occur, must *all* funds raised in connection with that election be refunded or redesignated in writing, or is the candidate permitted to spend some or all of those funds in connection with the anticipated special election?" Committee Request at 2. To address this question, it is important to define at the outset the meaning of the Committee's phrase, "raised in connection with [the anticipated special] election." The contribution limits of 2 U.S.C. § 441a(a) apply "with respect to" any election. By regulation, the Commission has provided that "with respect to any election" means:

- (i) [i]n the case of a contribution designated in writing by the contributor for a particular election, the election so designated . . . [and]
- (ii) [i]n the case of a contribution not designated in writing by the contributor for a particular election, the next election for Federal office after the contribution is made.

11 C.F.R. §§ 110.1(b)(2), 110.2(b)(2). Presumably, the Committee's reference to funds "raised in connection with [an anticipated special] election that subsequently does not occur" is limited to contributions designated in writing for the special election. If this is so, then we believe that the answer to the Committee's question is that those contributions must be refunded or redesignated in writing if the anticipated special election does not occur; and that a committee in that situation must keep on hand sufficient funds with which to meet any subsequent refund obligation.

In Advisory Opinion 2009-15 (White), the Commission addressed several questions by Mayor Bill White, who had filed a Statement of Candidacy for the regularly scheduled 2012 Texas Senate election, concerning the same anticipated 2010 Texas Senate special election at issue here. The Commission concluded that an undesignated contribution of \$2,400 or less would be available for the White Committee to use if a 2009 or 2010 Texas Senate special election was subsequently scheduled because contributions are limited to \$2,400 "with respect to any election," and a "special election that has been called would be the next Federal election after the undesignated contribution is made." See 2 U.S.C. §§ 441a(a)(1)(A), 441a(c); 11 C.F.R. § 110.1(b)(2). The Commission also concluded that a contributor could designate a \$4,800 contribution in the alternative such that \$2,400 would be for a special election if one was held, or for the regularly scheduled 2012 Texas Senate primary election if a special election was not held, and \$2,400 would be for a runoff special election if one was held, or for the regularly scheduled 2012 Texas Senate general election if a special election was not held. The Commission noted that by designating contributions in the alternative, "the specific use of the contribution will be clear to both the Committee and the contributor based on circumstances that will be a matter of public record: that the Governor would have to call a special election following the resignation of Senator Hutchison." The Commission concluded that the White Committee could not presumptively redesignate contributions designated in writing for the 2012 Texas Senate primary or general elections for a special election if one was called.

Most importantly as it pertains to this matter, however, the Commission concluded that if the White Committee raised money for this special election, and the special election did not occur, the White Committee was required to refund any contributions designated for the special election to the contributor within sixty days of the last date that a special election could be scheduled under Texas law, unless the committee received a written redesignation or combined redesignation or reattribution. The Commission noted that "contributions designated for an election that does not occur . . . must be refunded, redesignated for another election in which the candidate has participated or is participating in accordance with 11 C.F.R. § 110.1(b)(5), or redesignated and reattributed to another contributor in accordance with 11 C.F.R. § 110.1(k)(3)." Finally, the Commission noted that the White Committee would be required to file amended reports if the designation of a contribution would change depending on whether a special election was scheduled.

The Committee asks the Commission to conclude that "committees may legitimately incur expenses in connection with a special election that does not materialize, and that such expenses do not need to be recouped and refunded or redesignated, or misleadingly attributed to a future, regularly-scheduled election where the candidate was not in fact a candidate for such election." Committee Request at 6-7. However, as we noted in our Directive 69 memorandum, a conclusion that the Committee may retain contributions *designated in writing for the special election* appears contrary to the Commission's conclusion in Advisory Opinion 2009-15. Nothing in Advisory Opinion 2009-15 suggests that its conclusion that contributions designated for the special election had to be refunded or redesignated if the special election did not occur turns on the fact that Mayor White was registered with the Commission as a candidate in the regularly scheduled 2012 Texas Senate election. By permitting the White Committee to "raise money for a special election" but requiring it to refund or redesignate contributions designated for that election if the special election did not occur, it appears that the Commission concluded that committees that chose to raise and spend money designated for special elections that have not yet been scheduled do so at their own risk.

Accordingly, we recommend that the Commission conclude that the Committee was required to refund, or obtain redesignations or reattributions of, the contributions designated in writing for the special election within sixty days of Senator Hutchison's April 1, 2010 announcement that she would not resign her seat, meaning that the special election would not occur.

We also recommend, however, that the Commission conclude that the Committee could treat contributions that were not designated in writing for any particular election, or those non-specifically designated in writing for "the next upcoming election," as contributions made in connection with the regularly scheduled 2012 Texas Senate primary election. The necessary corollary to the conclusion in Advisory Opinion 2009-15 that a "special election that has been called would be the next Federal election after the undesignated contribution is made" is that if no special election is even called, the next regularly scheduled election for that office would be the "next Federal election." While at several points the request seems to complain that treating undesignated contributions as made with respect to the regularly scheduled 2012 primary

election would be "misleading," Committee Request at 4, 6-7, we note that Mr. Williams amended his Statement of Confidentiality to declare himself a candidate in the regularly scheduled 2012 Texas Senate election within a week of Senator Hutchison's April 1, 2010 announcement. Under those circumstances, it seems both consistent with the plain language of the Commission's regulations, and equitable in terms of how Mayor White was permitted to treat undesignated contributions, to permit the Committee to treat undesignated contributions as having been made for the regularly scheduled 2012 Texas Senate primary election.<sup>4</sup> Under this theory, because the Committee never amended its reports to change these contributions' designations after the April 1, 2010 announcement, it would need to file amended reports designating those contributions that were non-specifically designated for the 2012 Texas Senate primary election under the guidance on reporting provided in Advisory Opinion 2009-15. The Committee could spend these funds in any manner consistent with 2 U.S.C. § 439a(a), including for expenditures made in anticipation of the special election. Based on the Commission's guidance in Advisory Opinion 2009-15, however, the Committee is not entitled to a separate contribution limit with respect to the special election because the special election did not occur. See Advisory Opinion 2009-15 (requiring the White Committee to refund or redesignate contributions designated for the special election if the special election did not occur).

The Committee cites to several regulations and advisory opinions for the proposition that the Commission has previously addressed special election spending without suggesting that it might be impermissible, and has permitted committees to raise and spend funds in connection with other elections that never occur. See Committee Request at 4-5. We note, however, that these regulations and advisory opinions do not address the exact issue that the Commission appears to have directly addressed in Advisory Opinion 2009-15: If a committee raises money for the 2010 Texas Senate special election, and the special election does not occur, whether the committee is required to refund, or obtain redesignations or reattributions of, the contributions designated in writing for the special election. Compare Advisory Opinion 2009-15 (White), with 11 C.F.R. § 110.1(j)(2)-(3) (addressing only scheduled elections in which candidates are unopposed, or that are not held because the candidate is unopposed or received the majority of the votes in a previous election), Advisory Opinion 2006-22 (Wallace) (addressing only whether a potential candidate in a special election was a candidate that could accept contributions and make expenditures after raising and spending money for that special election, not whether this candidate was entitled to retain those contributions if the special election did not occur), Advisory Opinion 1986-21 (Owens) (addressing only a scheduled election in which the candidate was unopposed), Advisory Opinion 1986-19 (DSCC) (addressing only contribution limits in states where no popular primary occurs), Advisory Opinion 1978-65 (Ireland) (addressing only a scheduled election in which the candidate's name would not be on the ballot

<sup>4</sup> The Committee complains that "at least one other candidate who informed the Commission of his intention to raise funds and run in the 2010 special election appears to have escaped this same scrutiny simply by reporting that all funds raised and spent during the same time period were in connection with the 2012 regular election. This candidate terminated in November 2010, and we think it fair to conclude that he was never actually a candidate for the 2012 election." Committee Request at 6. It appears the Committee is referring to Mayor White and his committee. These facts do not, however, change the facts either that Mayor White was a candidate in the 2012 election at the time he sought AO 2009-15, or that he was permitted to treat undesignated contributions in precisely the same manner we recommend here for Mr. Williams.

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because he was unopposed), Advisory Opinion 1978-41 (Solomon) (addressing only a scheduled election in which the candidate was unopposed), and Advisory Opinion 1975-69 (Thurmond) (same).

Accordingly, we recommend that the Commission conclude that a candidate is required to refund, redesignate, or reattribute the contributions designated in writing for a special election that subsequently does not occur. The practical effect of this conclusion is that a candidate may not spend these funds or must otherwise retain enough funds to cover any potential refunds that would result if the special election does not occur. We also recommend, however, that the Commission conclude that a candidate is permitted to treat contributions that were not designated in writing for any particular election, or those non-specifically designated in writing for "the next upcoming election," as contributions made in connection with the next regularly scheduled election in which the candidate is participating; and that if the candidate chooses to treat undesignated contributions as having been received in connection with the next regularly scheduled election, the candidate is required to amend the committee's reports to indicate this. A candidate may spend these funds in any manner consistent with 2 U.S.C. § 439a(a). The Commission may express these conclusions by reaffirming the conclusions it made in this matter on February 6, 2012.

#### IV. RECOMMENDATION

Reaffirm the conclusions the Commission made in this matter on February 6, 2012.

#### Attachment

1. Letter from Thomas J. Josefiak and Michael Bayes, Counsel to the Committee, to Commission Secretary, at 6-7 (Feb. 15, 2012)